United States Department of Labor
Employees' Compensation Appeals Board

T.R., Appellant	)	
and	)	**Docket No. 12-12**
	)	**Issued: May 16, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Columbia, SC, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 3, 2011 appellant, through his attorney, filed a timely appeal from the June 28, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a traumatic injury to his right shoulder while in the performance of duty on May 30, 2010.

FACTUAL HISTORY

On June 23, 2010 appellant, a 44-year-old area maintenance technician, filed a traumatic injury claim (Form CA-1) alleging that he sustained a torn/fractured rotary cuff due to long-term,

[1] 5 U.S.C. § 8101 *et seq.*

heavy lifting at work and lack of proper tools and equipment. He indicated that the shoulder injury occurred on May 30, 2010 in the loading dock area.

The employing establishment controverted the claim on the grounds that appellant failed to establish the fact of injury. It noted that he had a previous injury to the right shoulder, which required treatment on April 27, 2010. The employing establishment also challenged appellant's claim for continuation of pay on the grounds that it was not timely filed.

In a letter dated June 24, 2010, Coworker Gregory Strickland stated that on April 30, 2010 he overheard appellant tell another coworker, Jimmy Garvin, that he had been treated by his physician for pain in his shoulder, which he had injured in November 2009 while wrestling with his nephew. Appellant noted that, if rehabilitation was unsuccessful, he might have to undergo surgery. On May 30, 2010 Mr. Strickland overheard appellant tell Mr. Garvin that his physician was in the process of scheduling shoulder surgery for June 2, 2010. He overheard appellant tell Manager Joseph Neary that he would be out for surgery beginning the next day and that his injury was not job related, but rather occurred in November 2009 while wresting with his nephew.

On June 26, 2010 Mr. Neary challenged appellant's claim, noting that he had been under a physician's care for two months for a previous shoulder injury. After missing three days of work, appellant returned to work on April 30, 2010 with a physician's note. He informed Mr. Neary that he had sustained a shoulder injury a few months earlier while playing with his nephew. Appellant told Mr. Neary that he was able to participate in an upcoming move of the carrier unit, which occurred on May 30, 2010. On June 3, 2010 he provided a note from his physician and requested a Form CA-1. When asked if he sustained an injury at work, appellant stated that his physician believed that his shoulder injury was aggravated by the May 30, 2010 move.

On July 13, 2010 OWCP notified appellant that the evidence submitted was insufficient to establish his claim and advised him to provide, within 30 days, additional documentation, including a firm diagnosis and a physician's opinion as to how his shoulder injury resulted in the diagnosed condition. It specifically asked him to provide a detailed description as to how the injury occurred, including the cause of the injury and statements from any witnesses or other documentation supporting his claim.

Medical evidence included reports for the period April 24 to August 13, 2010 from Dr. David B. Fulton, a Board-certified orthopedic surgeon. In an April 27, 2010 report, Dr. Fulton diagnosed severe right shoulder pain with chronicity. He related appellant's report of the onset of insidious pain over the previous several months and stated that appellant denied any direct trauma to the shoulder. The record also contains physical therapy notes, an April 30, 2010 magnetic resonance imaging (MRI) scan and a June 3, 2010 operative report.

Appellant submitted a copy of a July 29, 2010 application for benefits from the American Postal Workers' Accident Benefit Association, in which he represented that on May 30, 2010 he aggravated an injury to his right shoulder by lifting steel and metal casings, work benches and tables. He indicated that he "caught one" while it fell in his direction and felt a "pull and burn" in his shoulder while lifting on the job.

By decision dated August 26, 2010, OWCP denied appellant's claim finding that the evidence was insufficient to establish that the events occurred as alleged on May 30, 2010. On September 23, 2010 appellant requested an oral hearing before an OWCP hearing representative.

In an October 27, 2010 statement, appellant indicated that on May 30, 2010 Mr. Neary assigned him to move 60 letter casings and that he "incurred a more severe injury to a minor injury to [his] right shoulder when one of the letter casing boxes fell on [him] while moving the casings." He allegedly felt an immediate "pull and burn" in the right shoulder when the casing box fell and while lifting a large metal table a few minutes later.

In a September 20, 2010 report, Dr. Green B. Neal, a treating physician, stated that appellant was injured on the job on May 30, 2010 "tearing his right labrum and rotator cuff, resulting in impingement."

At the April 19, 2011 hearing, appellant testified as follows in response to his attorney's questions:

> "Q. Okay. And I understand that you claim that you injured your right shoulder on May 30, of 2010.
>
> "A. Yes, sir. That's correct.
>
> "Q. Now before May 30, of 2010, had you had any trouble with your right shoulder?
>
> "A. I had a slight aggravation with my arm, but it wasn't as bad as on May 30.
>
> "Q. Okay. Well, there's -- you heard in the introductory statement that there may be some evidence in here that you indicated to someone that you hurt your shoulder while wrestling. Is that true?
>
> "A. No, sir. I didn't injure my shoulder while wrestling."
>
> * * *
>
> "Q. Is it your testimony you did not hurt your right shoulder while wrestling?
>
> "A. No, sir. I didn't hurt my right shoulder while wrestling with my nephew. No, sir.
>
> "Q. Okay.
>
> "A. That was a long time ago."
>
> * * *

"Q. Okay. You said something about an arm. Had you ever had medical treatment for your shoulder?

"A. No, sir. Never."

* * *

"Q. Okay. But what I want to drive at is what's this minor injury that you had to your right shoulder?

"A. That was a scratch on my rotator cuff. I'm sorry. It was a cut -- it was a slight -- it was a little, slight tear on my rotator cuff and I went to the doctor on the 25th.

"Q. Okay. Let's slow down. Had you had an incident before May 30, that caused you to have pain and problems in your shoulder?

"A. They -- I know I was doing a lot of manual labor at the job. My shoulder was bothering me just a little bit.

"Q. In fact, I was just looking at an MRI scan, you had an MRI of your shoulder on April 30, of 2010. Isn't that true?

"A. That's true. That's true.

"Q. And that's Dr. David Fulton.

"A. That's Dr. David Fulton's office, yes, sir.

"Q. All right. Well, your shoulder must have been hurting enough for them to send you to an MRI. And this is a month before your work incident. Right?

"A. That's correct. That's correct. I did go to the doctor.

"Q. Well, I asked you if you'd had problems with your right shoulder before this incident in May. Now let's talk about it. Did you have problems with your right shoulder before May of 2010? Yes or no.

"A. Yes, sir."

In response to questions posed by an OWCP hearing representative, the records reflects:

"Q. Well, where did your supervisor get the story … that you were wrestling a few months prior to May the 30th and you hurt your shoulder? … So between whatever date this was that you were doing this wrestling and April of 2010, how much treatment had you undergone?

"A. I just -- I went to the doctor on the -- in April, because my arm was bothering me.

"Q. Okay. And was it -- what caused your arm to start bothering you?

"A. Well, I was -- I honestly believe it had to do with me using a lot of heavy lifting at the job.

"Q. Okay. But you told Mr. Neary that it was not work related.

"A. No, sir -- no, ma'am. I did not say that."

In a May 13, 2011 rebuttal to appellant's testimony, Mr. Neary reiterated that appellant had informed him and other employees that he injured his shoulder while wrestling with his nephew. He stated that appellant had never told him that the shoulder injury was work related.

By decision dated June 28, 2011, the hearing representative affirmed the August 26, 2010 decision, finding that appellant had failed to establish the fact of injury.

LEGAL PRECEDENT

FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[3]

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[4] When an employee claims that he sustained a traumatic injury in the performance of duty, he must establish the "fact of injury," namely, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged and that such event, incident or exposure caused an injury.[5]

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a *prima facie* case

[2] *Id.* at § 8102(a).

[3] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

[4] *Robert Broome*, 55 ECAB 339 (2004); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *See Paul Foster*, 56 ECAB 208 (2004). *See also Tracey P. Spillane*, 54 ECAB 608 (2003); *Betty J. Smith*, 54 ECAB 174 (2002). The term "injury," as defined by FECA, refers to a disease proximately caused by the employment. 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(q) (ee).

has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast substantial doubt on a claimant's statements. The employee has not met his burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.[6]

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[7] An award of compensation may not be based on appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[8]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[9]

ANALYSIS

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained a traumatic injury to his right shoulder on May 30, 2010. Appellant's presentation of the facts is not supported by the evidence of record and does not establish his allegation that a specific event occurred which caused an injury on the date in question.[10]

Inconsistencies in the record cast serious doubt on the validity of appellant's claim. Appellant initially reported on his June 23, 2010 CA-1 form that his right shoulder injury was due to long-term, heavy lifting at work and lack of proper tools and equipment. On the same claim form, however, he indicated that the shoulder injury occurred on May 30, 2010 in the loading dock area. The Board notes that appellant's internally inconsistent claim contained no detailed account of the incident, as required in a traumatic injury claim. In his October 27, 2010 statement, appellant declared that on May 30, 2010 he sustained his right shoulder injury when a heavy letter casing box fell on him during a move. In an application for benefits from the American Postal Workers' Accident Benefit Association, he described a different scenario,

[6] *See Betty J. Smith, id.*

[7] *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

[8] *Dennis M. Mascarenas* , 49 ECAB 215, 218 (1997).

[9] *John W. Montoya*, 54 ECAB 306 (2003).

[10] *See Dennis M. Mascarenas, supra* note 8.

stating that he aggravated an injury to his right shoulder on May 30, 2010 while lifting steel and metal casings, work benches and tables.

Appellant's testimony during the April 19, 2011 hearing creates further doubt as to the accuracy of his claim. Initially, he testified that he had never had medical treatment for a shoulder condition prior to May 30, 2010. Appellant later stated that he sought treatment for right shoulder problems in April 2010, which he attributed to manual labor on the job. In response to the hearing representative's question as to whether he hurt his shoulder while wrestling with his nephew, appellant stated, "No, sir. I didn't hurt my right shoulder while wrestling with my nephew. No, sir…. That was a long time ago." On the one hand, appellant denied injuring his shoulder during a wrestling incident; on the other, he suggested that he injured his shoulder during a wrestling incident that occurred a long time ago. His testimony confuses, rather than clarifies, the facts of this case. The accuracy of appellant's claim is further undermined by Mr. Strickland's statement reflecting that appellant attributed his shoulder injury to a November 2009 wrestling match with his nephew and Mr. Neary's June 26, 2010 statement reflecting appellant's report that he injured his shoulder a few months earlier while playing with his nephew.

The medical evidence of record does not support appellant's claim. In his April 27, 2010 report, Dr. Fulton diagnosed severe right shoulder pain with chronicity and related appellant complaints of the onset of insidious pain over the previous several months. This report strongly suggests that appellant's shoulder condition developed prior to May 30, 2010, contrary to his claim.

Thus, appellant has failed to establish the fact of injury: he did not submit sufficient evidence to establish that he actually experienced an employment incident at the time, place and in the manner alleged or that the alleged incident caused his condition. Therefore, the Board finds that he has not met his burden of proof to establish that he sustained a right shoulder injury in the performance of duty on May 30, 2010.[11]

On appeal, appellant's representative contends that OWCP's June 28, 2011 decision was contrary to fact and law. For reasons stated above, the Board finds that appellant has failed to meet his burden of proof. Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained a traumatic injury to his right shoulder in the performance of duty on May 30, 2010.

[11] As appellant failed to establish that the claimed event occurred as alleged, it is not necessary to discuss the probative value of medical evidence. *Id*.

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 16, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board